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No. 88-_____

In the

# Supreme Court of the United States

October Term, 1988

HAROLD W. GRANDCHAMP and
PETER J. SEEWALD,

*Petitioners,*

v.

UNITED AIR LINES, INC.,
a Delaware corporation,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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## QUESTIONS PRESENTED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34 (1988) creates a civil cause of action for discrimination in employment based on age. Plaintiffs asserting claims under the ADEA are precluded from recovering damages for emotional distress; however, plaintiffs are entitled to join pendent state tort law claims with their ADEA claim under the principle of pendent jurisdiction.

The questions presented are:

1. Whether the ADEA preempts recovery for state tort claims arising out of the fact situation upon which the ADEA claims are premised; and

2. Whether a plaintiff asserting claims under the ADEA, together with a pendent state claim of intentional infliction of emotional distress, must prevail on his ADEA claims before the intentional infliction of emotional distress claim can be submitted to the jury.

[Note: Petitioners reserve the right to argue Question 3 in the event certiorari is granted on either Question 1 or 2, but do not include Question 3 among the reasons for the grant of certiorari.]

The "local judge" rule provides that in the absence of direct state precedent concerning pendent state law claims a federal court of appeals cannot overturn a local district judge's interpretation of state law unless it is clearly erroneous. Some state tort claims, such as intentional infliction of emotional distress, require a trial judge to determine initially whether the issue should be submitted to the jury.

The question presented is:

3. Whether the "local judge" rule applies where a trial court judge determines that as to a pendent state tort claim for intentional infliction of emotional distress the requisite threshold determination of outrageousness has been satisfied.

## LIST OF PARTIES

The parties to the proceedings below were petitioners Harold W. Grandchamp ("Grandchamp") and Peter J. Seewald ("Seewald") and respondent United Air Lines, Inc. ("United").

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HAROLD W. GRANDCHAMP and
PETER J. SEEWALD,

*Petitioners,*

v.

UNITED AIR LINES, INC.,
a Delaware corporation,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Grandchamp and Seewald respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), entered on August 18, 1988. Grandchamp and Seewald's petition for rehearing and suggestion for *in banc* consideration by the Tenth Circuit was denied on October 24, 1988.

## OPINIONS BELOW

The trial court's memorandum and order (A-1) denying United's motion for partial summary judgment and/or judgment on the pleadings is at 36 Empl. Prac. Dec. (CCH) Para. 34,987 (D.Colo. 1985). The Opinion (A-7) of the panel of the Tenth Circuit below is at 854 F.2d 381 (10th Cir. 1988). The Order of the Tenth Circuit denying the Petition for Rehearing and Suggestion for *In Banc* Consideration (A-17) is unreported.

## JURISDICTION

The decision of the Tenth Circuit in this case was entered on August 18, 1988. The Order denying Petitioners' Petition for Rehearing and Suggestion for *In Banc* Consideration was entered on October 24, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988) and Rule 17 of this Court's Rules.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part as follows:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

The Age Discrimination in Employment Act (ADEA) 29 U.S.C. §§ 621-34 (1988) provides in pertinent part as follows:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed

> to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: ....

29 U.S.C. § 626(b) (1988).

The ADEA expressly incorporates certain provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19 (1988). Specifically, 29 U.S.C. § 216 (1988) provides in pertinent part as follows:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional amount as liquidated damages.

29 U.S.C. § 216(b) (1988).

## STATEMENT OF THE CASE

This case involves Grandchamp and Seewald's claims concerning United's 1981 reorganization of inflight services and Grandchamp and Seewald's subsequent demotion and early retirement, respectively. (A-1). Grandchamp and Seewald initiated claims that were later consolidated alleging violations of the ADEA, 29 U.S.C. §§ 621-34 (1988) and a variety of state common law claims. (A-1-2). Jurisdiction was based on diversity, 28 U.S.C. § 1332 (1988) and the ADEA, 29 U.S.C. § 626(c) (1988).

Prior to the trial in this matter, United moved for partial summary judgment and/or for judgment on the pleadings with respect to Grandchamp and Seewald's pendent state claims. *Grandchamp*, 36 Empl. Prac. Dec. (CCH) Para. 34,987 (A-1). On January 16, 1985, the trial court, the Honorable Jim R. Carrigan, granted United's motion for partial summary judgment on Grandchamp and Seewald's claims for breach of express and implied contract and promissory estoppel. *Id.* (A-4). United's motion for partial summary judgment on Grandchamp and Seewald's claim for intentional infliction of emotional distress was denied and Judge Carrigan held:

> Grandchamp and Seewald have alleged intentional infliction of emotional distress. United argues that its conduct would not lead an average member of the community to exclaim, "outrageous!" [citation omitted]. In *Widdifield v. Robert Shaw Controls Co.*, 671 P.2d 989 (Colo.App. 1983), the court ruled that a claim for outrageous discharge could not be submitted to the jury unless the conduct was "beyond all reasonable bounds of decency" and "atrocious and utterly intolerable in the civilized community." If a jury were to conclude that the defendant's entire management reorganizaton was a mere scam to hide its efforts to dismiss older employees who have been with the company for years, a reasonable person could find "outrageous" conduct. The disagreement is over a material issue of fact. United is not, therefore, entitled to summary judgment on this claim.

*Grandchamp v. United Air Lines, Inc.*, 36 Empl. Prac. Dec. (CCH) Para. 34,987, at 36,415 (D.Colo. 1985) (A-3).

On February 11-19, 1985 the case was tried to a jury. (A-5). Prior to trial, all of Grandchamp and Seewald's claims were dismissed except their ADEA and intentional infliction of emotional distress claims. *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 382 n. 2 (10th Cir. 1988) (A-9 n.2). At the close of all the evidence, the district court submitted Grandchamp and Seewald's ADEA and intentional infliction of emotional distress as separate and distinct claims to the jury. 854 F.2d at 382, 383 n.3 (A-9 n.3).

The jury reached a verdict finding for Grandchamp and Seewald, on their claims for intentional infliction of emotional distress, and for United with respect to Grandchamp and Seewald's ADEA claims. *Id.* at 382-83 (A-9). The jury awarded Grandchamp and Seewald punitive damages in the amount of $90,000.00 apiece and actual damages in the amounts of $16,000.00 and $36,000.00, respectively. (A-5-6). A judgment in the amount of $232,000 plus post-judgment interest was entered on February 20, 1985 in the federal district court for the district of Colorado. (A-5-6).

United moved for a judgment notwithstanding the verdict or in the alternative for a new trial on the award of damages for intentional infliction of emotional distress. 854 F.2d at 383 (A-9). The district court denied United's motion. *Id.* (A-9).

United appealed to the Court of Appeals for the Tenth Circuit where the jury verdict and judgment of the district court were reversed. *Id.* at 386 (A-16). The Tenth Circuit held that the intentional infliction of emotional distress claims should not have been submitted to the jury. *Id.* at 382 (A-8).

The Tenth Circuit's holding is anomalous given its determination that the trial court, on two separate occasions, made the requisite threshold determination of outrageousness that is required by Colorado law.[1] *Id.* at 383 (A-11). As to the intentional infliction of emotional distress claim, the Tenth Circuit's opinion that it should not have been submitted to the jury appears to be *de novo* fact-finding. Noting that the verdict seemed to be inconsistent, the Tenth Circuit observed that the evidence supported the conclusion that Grandchamp and Seewald were not given new positions because of age and seniority. *Id.* at 383 n.3, 385 (A-14).

Acknowledging that United's conduct was wrong, the Tenth Circuit constructively held that Grandchamp and Seewald's only remedy was under the ADEA; only if successful on the ADEA claims could the intentional infliction of emotional distress claims be properly submitted to the jury. *Id.* (A-14). The Tenth Circuit panel reasoned that "if Grandchamp and Seewald were allowed to recover under a theory of outrageous conduct for United's actions here, then every discrimination claim ... would also state a claim for outrageous conduct." *Id.* (A-14). In the footnote to the previously quoted sentence, the Tenth Circuit inexplicably confused willfulness under the ADEA with the pendent state tort claim of intentional infliction of emotional distress. The Tenth Circuit stated, in pertinent part, as follows:

> In essence, this Court has already held that an ADEA claim for willful age discrimination does not require outrageous conduct. In *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988), we rejected the Third Circuit's conclusion that a willful violation of the ADEA must be "outrageous." *See Dreyer v. Arco*

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[1] *See Montgomery Ward & Co. v. Andrews*, 736 P.2d 40, 46 (Colo.Ct.App. 1987). *See also Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1350 (Colo. 1988) *rev'g in part*, 725 P.2d 38 (Colo.Ct.App. 1986) (citing *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970)).

> *Chemical Co.*, 801 F.2d 651 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987). *Thus, in age discrimination cases, there is, theoretically, an hierarchy of damages. First, if an employer discriminates against an employee on the basis of age, he is liable for damages. If that discrimination is "willful," the employer must pay liquidated damages. See Cooper*, 836 F.2d at 1548. *If the manner of discrimination is outrageous, the employer is liable for the employee's emotional distress.* Finally, under Colorado law, if the employee proves beyond a reasonable doubt that the outrageous conduct was attended by fraud, malice, or willful or wanton conduct, punitive damages may be assessed.

*Id.* at n.8 (A-14 n.8) (emphasis added).[2]

## REASONS FOR GRANTING THE WRIT

The Writ should be granted in this case for two reasons. First, this Court should clarify the precise relationship between claims under the ADEA or Title VII and pendent state tort claims arising out of a common nucleus of facts. Second, and relatedly, the effect of the Tenth Circuit's decision in *Grandchamp* is a *de facto* preemption of state law claims and the theoretical "hierarchy of damages" conflicts in principle with the Ninth Circuit's decision in *Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S.Ct. 131, 459 U.S. 859 (1982). Moreover, the "hierarchy of damages" unjustifiably discriminates against ADEA plaintiffs such that it violates fundamental notions of due process and equal protection.

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[2] Ultimately, the Tenth Circuit's opinion in *Grandchamp* reflects confusion as to how the jury arrived at a verdict of no ADEA violations concurrent with a verdict finding intentional infliction of emotional distress. The two claims, however, protect different rights and contrast to situations where a jury finds no ADEA violation but does find a retaliatory discharge under the ADEA. *See, e.g., Rose v. Hearst Magazines Division, The Hearst Corp.*, 814 F.2d 491, 493 (7th Cir. 1987). A discharge can be outrageous and not discriminatory or vice versa.

## I. The Relationship Between Pendent State Tort Claims And ADEA Or Title VII Claims Warrants This Court's Review.

Today, in contrast to 30 years ago, a discharged employee has a plethora of federal and state remedies available. *See generally,* DeGuiseppe, *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits,* 10 FORDHAM URB. L.J. 1 (1981); Note, *Protecting At Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L.REV. 1816 (1980). Depending upon the particular facts and circumstances of each case, a discharged employee can pursue claims under Title VII or the ADEA, as well as state contract and tort remedies. Cathcart *et al., The Developing Law of Wrongful Terminations,* in 1986 EMPLOYMENT LITIGATION 153, 155-82 (PLI).

The damages recoverable under the various theories available to a discharged employee sometimes overlap. For example, under the ADEA, an employee discriminated against on the basis of age, is entitled to recover both back and front pay. Similarly, an employee alleging a state common law contract claim, may be entitled to recover both back and front pay. In those instances, recovery under both federal and state theories of liability is duplicative. In other situations, however, the facts and circumstances surrounding an employee's discharge may give rise to claims for alleged violation of Title VII or the ADEA and state common law tort claims. In these latter situations, the state tort remedies are designed to compensate the discharged employee for damages other than the economic type damages permitted under Title VII or the ADEA. Because of the ever increasing number of state tort claims joined together with federal claims arising in the employment context, this Court should delineate and clarify the relationship between federal employment-related claims under Title VII or the ADEA and state tort claims.[3]

[3]The type of delineation necessary is similar to that provided by this Court in *Farmer v. United Brotherhood of Carpenters,* 97 S.Ct. 1056, 430 U.S. 290 (1977). In *Farmer,* this Court held that, in the context of labor relations, a complaint alleging intentional infliction of emotional distress is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1988) only if the conduct complained of is of a type that would be expected in the ordinary course of employer-employee relations.

Often, and as previously stated, state common law claims are joined with ADEA claims under the discretionary doctrine of pendent jurisdiction. *See, e.g., Grandchamp,* 854 F.2d at 852; *Cancellier,* 672 F.2d at 1315; *Pettibon v. Pennzoil Products Co.,* 649 F.Supp. 759, 761-62 n.3 (and cases cited therein) (W.D.Pa. 1986).[4] It is axiomatic that under the ADEA a plaintiff is not entitled to recover damages for emotional distress and punitive claims. *See Bruno v. Western Electric Co.,* 829 F.2d 957 (10th Cir. 1987); *Haskell v. Kaman Corp.,* 743 F.2d 113 (2nd Cir. 1984); *Rodriguez v. Taylor,* 569 F.2d 1231 (3rd Cir. 1977), *cert. denied,* 98 S.Ct. 2254, 436 U.S. 913 (1978); *Pettibon, 649 F.Supp. at 761.*[5] Congress, however, has never stated whether state common law remedies "trench too closely on the federal scheme." *Cancellier,* 672 F.2d at 1318.

This Court must, because of the absence of Congressional action, clarify the relationship between state common law claims arising out of the same set of facts upon which an alleged ADEA or Title VII claim is premised. This Court's pronouncement in *Motor Coach Employees v. Lockridge,* 91 S.Ct. 1909, 403 U.S. 274 (1971) regarding the relationship between state law and the jurisdiction of the National Labor Relations Board applies equally to state common law tort claims and Title VII or the ADEA:

> [W]e [cannot] proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal

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[4]In *Cancellier,* the Ninth Circuit suggested that when pendent state claims are joined with ADEA claims, jury verdicts should be closely scrutinized. 672 F.2d at 1317. The primary concern was a jury's failure to distinguish between the two types of claims and an award of hidden damages. *Id.* This concern, however, was not present in *Grandchamp* because the claims were submitted separately. *See generally, Pettibon,* 649 F.Supp. at 761-63 (discussing problems of intentional infliction of emotional distress claims joined with ADEA claims).

[5]Similarly, damages for emotional or mental distress are not recoverable under Title VII. 42 U.S.C. §§ 2000e-2000e-17 (1988). *See Padway v. Palches,* 665 F.2d 965, 968 (9th Cir. 1982); *Wasilchuk v. Harvey's Wagon Wheel, Inc.,* 610 F.Supp. 206, 209-10 (D.C.Nev. 1985).

> system dictates that this problem be solved with a rule capable of relatively easy application, so lower courts may largely police themselves in this regard.

91 S.Ct. at 1919, 403 U.S. at 289-90 (*quoted in Farmer*, 97 S.Ct. at 1061 n.7, 430 U.S. at 296 n.7).

In order to combat discrimination in employment, Congress enacted Title VII and later the ADEA. *See* 29 U.S.C. §§ 621-34 (1988); 42 U.S.C. §§ 2000e-2000e-17 (1988). These statutes provide a federal framework to protect minorities against discrimination in securing and maintaining employment. *See* 29 U.S.C. § 621 (1988); 42 U.S.C. § 2000e (1988). Concurrent with the enactment of these federal statutes, an overlapping body of state common law has developed that protects the broader public's employment security. Just as in the area of labor relations, *see, e.g., Farmer, supra,* and in the absence of Congressional guidance, this Court should exercise its plenary power and clarify the relationship between these two bodies of law.

Under the standards governing the issuance of a writ of certiorari, this case merits review because it involves an important and significant issue. *See, e.g., NLRB v. Pittsburgh S.S. Co.*, 71 S.Ct. 453, 456, 340 U.S. 498, 509 (1951). The problem posed by the absence of guidance from this Court is not merely academic or episodic and therefore a writ should be issued. *See Rice v. Sioux City Cemetery*, 75 S.Ct. 614, 616, 349 U.S. 70, 74 (1955).

## II. The *Grandchamp* Decision Engrafts A Doctrine Of *De Facto* Preemption On ADEA Or Title VII Claims And Creates An Impermissible Classification Violative Of Due Process.

The theoretical "hierarchy of damages" in age discrimination cases described in *Grandchamp*, 854 F.2d at 385 n.8, is contrary to all precedent. In fact, the "hierarchy of damages" conflicts in principle with the Ninth Circuit's declaration in *Cancellier* that "[t]he ADEA does not preempt the award of tort damages on pendent state claims." 672 F.2d at 1318 (*citing Kelly v. American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir. 1978)). *See also, Pettibon*, 649 F.Supp.

at 761-63. Willfulness under the ADEA or Title VII and with respect to either claim does not relate, nor even affect, a state common law tort claim for intentional infliction of emotional distress.

Obviously, requiring plaintiffs to first prevail on their ADEA or Title VII claim *and* on the issue of willfulness prior to submitting a state tort claim to the jury, places a higher burden on persons between the ages of 40 and 70 than those outside this age group.[6] It is ironic that *Grandchamp* stands for the proposition that in order to combat the evils the ADEA and Title VII were enacted to remedy, a person is required to sacrifice their rights to assert a state tort claim. Contrary to the Tenth Circuit's reasoning, Judge Teitelbaum observed that "[p]ermitting an employee whose employer has discriminated against him solely because of age, to take advantage of all existing legal rights is therefore not inconsistent with the purposes of the ADEA." *Pettibon*, 649 F.Supp. at 763.

## CONCLUSION

In reversing a jury verdict that "appeared to be inconsistent", the Tenth Circuit unequivocally illustrated its view that the discharge of a person within a protected class cannot be outrageous unless the discharge violates Title VII or the ADEA. Reversing the verdict on the basis of what Grandchamp and Seewald *alleged* and *ignoring* the fact that a jury found evidence of sufficiently outrageous conduct to award both compensatory *and* punitive damages is the most perplexing aspect of *Grandchamp*.

The Tenth Circuit's decision in *Grandchamp* demonstrates the potential for confusion that is created when federal courts exercise their discretion and decide state common law tort claims joined with ADEA or Title VII claims. A failure to provide guidance to

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[6] "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive. ... [D]iscrimination may be so unjustifiable as to be violative of due process." *Bolling v. Sharp*, 74 S.Ct. 693, 694, 347 U.S. 497, 499 (1954). *See also Buckley v. Valeo*, 96 S.Ct. 612, 424 U.S. 1 (1976) (equal protection under Fifth Amendment is same as that under Fourteenth Amendment).

the lower federal courts and to delineate clearly between the interests protected will only serve to perpetuate inequitable and unfair decisions like *Grandchamp*. This case presents this Court with an opportunity to avoid further confusion.

Dated: January 20, 1989.

Respectfully submitted,

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**Harold W. Grandchamp et al., Plaintiffs v. United Air Lines, Inc., Defendant.**

United States District Court, District of Colorado. Civil Action No. 83-C-1254. January 16, 1985.

Edward J. Rau, Denver, Colorado, for Plaintiff.

Robert H. Brown, Chicago, Illinois; Patrick F. Gartland, Denver, Colorado, for Defendant.

CARRIGAN, D.J.: In these consolidated cases the plaintiffs, Harold W. Grandchamp and Peter J. Seewald, have asserted tort, age discrimination, and breach of contract claims against the defendant United Air Lines (United). Plaintiffs allege that United committed these wrongs during its reorganization of flight attendant management personnel. Defendant United has filed a motion "for partial summary judgment and/or for judgment on the pleadings." The parties have briefed the issues thoroughly and oral argument would not assist in resolving them. Jurisdiction is based on diversity, 28 U.S.C. § 1332 (1982), and on the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982).

Grandchamp began working for United in 1950. He became a supervisor of inflight services in December 1978. Seewald began with United in 1960. He had been a supervisor of inflight services since 1977. In 1981, due to airline deregulation and economic recession, United cut back its employees and reorganized its management staff. At that time United eliminated the supervisor of inflight services position, and the plaintiffs were allowed to apply for restructured management positions involving similar duties. At the time Seewald was forty-eight, and Grandchamp, forty-nine years old.

All applicants for the restructured positions were screened in a highly structured selection process involving personal interviews and evaluation by former supervisors. Seewald's and Grandchamp's scores placed them near the bottom of the applicant list for three

positions available in Denver. (Affidavit of Ron Tokuyama, exhibit A). Neither plaintiff was selected.

United gave both plaintiffs the option to return to their last non-management positions with salary reductions phased in over two years. Grandchamp took this option and became a customer services agent. Seewald elected instead to be laid off. Subsequently, both Grandchamp and Seewald filed actions which were consolidated.

In their first and second claims for relief, both plaintiffs alleged breach of express and implied employment contracts. Under applicable Colorado law, absent special considerations or an express stipulation stating a definite term of employment, either party may terminate an employment contract at will. *Lampe v. Presbyterian Medical Center,* 590 P.2d 513 (Colo. App. 1978); *Justice v. Stanley Aviation Corp.,* 35 Colo. App. 1, 530 P.2d 984 (1974). *See also Ritter v. Colorado Interstate Gas Co.,* No. 84-C-841 (D. Colo. Sept. 26, 1984).

Here, no contract states a definite term of employment. Plaintiffs contend that the United Airlines personnel regulations created an express or implied employment contract. Assuming, arguendo, that the personnel regulations gave rise to contractual obligations, the parties were bound to an expressly indefinite period of employment. The regulations define regular full-time employees: "Those employed on a full-time basis who are to be retained for an *indefinite* period." (emphasis added) (Affidavit of Scott R. Gilday, exhibit C) Moreover, other provisions of the regulations provide for the possibility of management lay-offs. (Affidavit of Scott R. Gilday, exhibit A). Clearly, the plaintiffs had not contracted, either expressly or by implication, for a definite period of employment. Defendant is entitled to summary judgment on these claims.

Plaintiffs' respective third claims for relief assert promissory estoppel. A claim for promissory estoppel requires that the defendant made a promise that reasonably was expected to induce action or forebearance and which did in fact induct such action or forbearance. The expressly indefinite period of employment described above demonstrates that the plaintiffs could not have reasonably relied on the "promise" of life-long employment. The defendant is entitled to summary judgment on the third claims for relief.

Seewald's sixth claim for relief alleges that he was wrongfully

discharged. In Colorado, wrongful discharge occurs only where an employee is discharged for exercising a specifically enacted right or duty. *Lampe v. Presbyterian Medical Center, supra.* Here, the plaintiffs were not discharged for exercising their rights or duties. Summary judgment on this claim is likewise appropriate.

Defendant contends that Seewald's seventh claim, based on alleged fraudulent misrepresentations, should be dismissed because it has not been pleaded with sufficient particularity. Fed. R. Civ. P. 9(b), and because the undisputed facts do not support the plaintiff's claim. Seewald's fraud claim is not based, as the defendant argues, on United's alleged misrepresentations concerning continued employment. Rather, Seewald claims, and states with sufficient particularity, that United's entire management reorganization was an elaborate *fradulent* scheme to eliminate older employees. (*See* Seewald's complaint paragraphs 12, 13, 14, 17 and 30.) Thus, the plaintiff's fraud claim cannot be dismissed pursuant to Rule 9(b).

With respect to the defendant's argument that the plaintiff will not be able to establish the elements of fraud, material issues of fact regarding United's fraudulent intent and Seewald's alleged damages from the fraud remain. Accordingly, summary judgment on the plaintiff Seewald's seventh claim is not appropriate.

Grandchamp and Seewald have alleged intentional infliction of emotional distress. United argues that its conduct would not lead an average member of the community to exclaim, "outrageous!" *See Rugg v. McCarty,* 173 Colo. 170, 476 P.2d 754 (1970). In *Widdifield v. Robertshaw Controls Co.,* 671 P.2d 989 (Colo. App. 1983), the court ruled that a claim for outrageous discharge could not be submitted to the jury unless the conduct was "beyond all reasonable bounds of decency" and "atrocious and utterly intolerable in the civilized community." If a jury were to conclude that the defendant's entire management reorganization was a mere scam to hide its efforts to dismiss older employees who had been with the company for years, a reasonable person could find "outrageous" conduct. The disagreement is over a material issue of fact. United is not, therefore, entitled to summary judgment on this claim.

Defendant has sought to strike the plaintiffs' claims for exemplary damages because they are not strictly a "claim", but rather a

part of the prayer for relief. While the defendant is correct in its characterization of punitive damages as a remedy rather than a claim for relief, in this court, the plaintiffs' potential entitlement to exemplary damages will not be forfeited over technical or formalistic enforcement of pleading rules. The motion to strike the "claims" for exemplary damages is denied, with leave to amend the complaints within ten days to pray for punitive and exemplary damages.

Finally Grandchamp and Seewald have claimed relief based on the Colorado Age Discrimination Act (ADA), Colo. Rev. Stat. § 8-2-116 (1973). United has responded that no private cause of action should be recognized under the ADA. In *Rawson v. Sears Roebuck and Co.* [31 EPD Para. 33,525]. 530 F. Supp. 776 (D. Colo. 1982, this district allowed a private citizen to bring an ADA civil action. The ADA states that discrimination based on age is a crime. Colo. Rev. Stat. § 8-2-116 (1973). Section 8-3-108(1)(1)1973) explains, "It is an unfair labor practice for an employee, individually or in concert with others to ... [c]ommit any crime or misdemeanor in connection with any controversy as to employment relations." Thus, committing a labor-related crime is an unfair labor practice. Finally, § 8-3-121(1)(1973) provides a civil cause of action for victims of unfair labor practices: "Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person thereby." Taken together, these provisions allow an aggrieved individual to assert civil claims under the ADA.

Accordingly, for the reasons stated above,

It is Ordered that the defendant's motion for partial summary judgment is granted on the plaintiffs' first, second and third claims and on the plaintiff Seewald's sixth claim.

It is further Ordered that the defendant's motion for partial summary judgment on both plaintiffs' fifth claims, on Grandchamp's sixth and seventh claims, and on Seewald's seventh, eighth, and ninth claims is denied.

It is Further Ordered that the plaintiffs' motion for partial summary judgment is denied.

**In the United States District Court**
**for the District of Colorado**

Civil Action No. 83-C-1254

HAROLD W. GRANDCHAMP and PETER SEEWALD,
*Plaintiffs,*

vs.

UNITED AIRLINES, INC., a Delaware corporation,
*Defendant.*

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## JUDGMENT

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This matter came on for trial to Court and jury, The Honorable Jim R. Carrigan, District Judge, presiding, on February 11–19, 1985. The issues were duly tried and the case was submitted to the jury, which reached a verdict finding for the plaintiffs in part and for the defendant in part. The Court has ordered judgment to be entered on the verdict; accordingly, it is

ORDERED AND ADJUDGED that judgment is entered in favor of the defendant United Airlines, Inc., and against the plaintiffs Harold W. Grandchamp and Peter C. Seewald on the plaintiff's claims for age discrimination, and it is

FURTHER ORDERED that judgment is entered in favor of the plaintiff Harold W. Grandchamp and against the defendant United Airlines, Inc., on the plaintiff Grandchamp's claim for outrageous conduct in the amounts of $16,000.00 in actual damages and $90,000.00 in punitive or exemplary damages, for a total of $106,000.00 plus interest from the date of entry of this judgment at the legal rate of 9.17% per annum, and it is

FURTHER ORDERED that judgment is entered in favor of the plaintiff Peter J. Seewald and against the defendant United Airlines, Inc., on the plaintiff Seewald's claim for outrageous conduct in the amounts of $36,000.00 in actual damages and $90,000.00 in punitive or exemplary damages, for a total of $126,000.00 plus interest from the date of entry of this judgment at the legal rate of 9.17% per annum. It is

FURTHER ORDERED that costs are awarded to the plaintiffs upon the filing of a Bill of Costs within ten days of the entry of judgment.

DATED at Denver, Colorado, this 20th day of February, 1985.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

United States Court of Appeals
Tenth Circuit

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No. 86-2338

HAROLD W. GRANDCHAMP and
PETER SEEWALD,

*Plaintiffs-Appellees,*

vs.

UNITED AIR LINES, INC.,

*Defendant-Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 83-C-1254)

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Edward J. Rau, Attorney at Law, Denver Colorado, for Plaintiffs-Appellees.

Patrick F. Gartland (Catherine M. Meyer with him on the briefs), Montgomery Little Young Campbell & McGrew, P.C., Englewood, Colorado, for Defendant-Appellant.

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Before HOLLOWAY and ANDERSON, Circuit Judges, and DUMBAULD,* District Judge.

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ANDERSON, Circuit Judge.

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*Hon. Edward Dumbauld, U.S. District Court, Western District of Pennsylvania, sitting by designation.

United Air Lines, Inc. ("United") appeals from a jury verdict assessing damages for the intentional infliction of emotional distress arising from employment decisions involving appellees Harold Grandchamp and Peter Seewald. We find that the trial court erred in submitting the claim to the jury and reverse the judgment.

## I.

Grandchamp and Seewald, were employed by United as Supervisors of Inflight Services, in Denver, Colorado. Grandchamp and Seewald were responsible for the supervision and management of United flight attendants. In 1981, United initiated a reorganization of its inflight services functions and the position of Supervisor of Inflight Services was eliminated. The functions of this former position were replaced by three new positions, and former Supervisors of Inflight Services, including Grandchamp and Seewald, were invited to compete for the new positions. At the time of the reorganization, Grandchamp was 49 years old and had worked for United for 31 years, Seewald was also 49 years old, and had worked for United for more than 21 years.

To fill the new positions, United developed a special selection process consisting of a "special assessment," designed to "measure observed behaviors on the job" and relate those behaviors to the characteristics required for the new positions, and a "structured interview," also designed to identify and measure the characteristics required for the new positions. The process resulted in a numerical score and candidates were ranked according to those scores. *See* R. Vol. II at 238–45. This special process was used only to review the incumbent Supervisors of Inflight Services who were applying for the new positions.[1]

After reviewing the numerical scores and ranking of the candidates, United determined that the low scorers, including Grandchamp and Seewald, would not be offered the new positions. Grandchamp and Seewald were replaced with younger employees with less seniority.

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[1]The testimony by United officials indicated, however, that in Denver, at least, other United employees were also allowed to compete for the new jobs by participating in this selection process. *See* R. Vol. III at 633–35.

Grandchamp and Seewald were informed by their Denver supervisor that they had not been selected for the new positions. Both were eligible to return to their last non-management position with United. Grandchamp was offered, and accepted, a position as a passenger ticket agent in Denver. Seewald was offered a job as a schedule planner in Los Angeles or Miami, but declined to move. Instead, he accepted six months severance pay and a United seminar on job-hunting.

Subsequently, both men brought actions against United claiming violations of the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et. seq.*, and damages resulting from the intentional infliction of emotional distress (an action under Colorado common law frequently referred to as "outrageous conduct" or "emotional distress").[2] The case went to trial on these two claims and the jury found in favor of United on the ADEA claim, and for the plaintiffs, Grandchamp and Seewald, on the intentional infliction of emotional distress claim, awarding actual and punitive damgages to both men.[3] Grandchamp and Seewald moved for a judgment notwithstanding the verdict on the ADEA claim; that motion was denied and they do not appeal. United moved for a judgment notwithstanding the verdict, or in the alternative for a new trial, on the award for emotional distress. The district court denied that motion and United has appealed. United urges this court to reverse the jury's verdict in favor of Grandchamp and Seewald, arguing (1) that the claim for intentional infliction of emotional distress is barred by the Colorado Workmen's Compensation statute; (2) that the plaintiffs' claims were in fact, wrongful discharge claims, impermissible under Colorado law; (3) that United's conduct was not outrageous; and (4) that Grandchamp and Seewald failed to offer sufficient evidence of emotional distress. After carefully reviewing the arguments and the trial record, we conclude, as a matter of law, that United's conduct was not outrageous, and that the trial

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[2]Other claims were dismissed by the district court before trial and are not at issue on appeal. *See* R. Vol. I, Tab 2.

[3]Although the verdicts on the two claims appear inconsistent, neither party objected to the jury's verdict or raises that issue on appeal.

court should have directed a verdict for United on the outrageous conduct claim. Accordingly, we reverse and have no need to consider the other arguments.[4]

## II.

"In reviewing a district court's denial of a motion for a judgment n.o.v., we may find error only when the evidence points but one way and is susceptible to no reasonable inferences sustaining the position of the party against whom the motion is made." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988) (citing *EEOC v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985)).

The tort of intentional infliction of emotional distress was adopted by the Colorado Supreme Court in *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753, 756 (1970). The Colorado Court adopted the *Restatement (Second) of Torts* § 46 (1965) in defining this action. Under the *Restatement*, liability may be found only "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Rugg*, 476 P.2d at 756. (quoting *Restatement* § 46, comment d); *see also Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1158–59 (10th Cir. 1981) (en banc) (discussing Colorado law), *cert. denied*, 464 U.S. 824 (1983); *Churchey v. Adolph Coors Co.*, P.2d, 1988 WL 68488 (Colo. 1988) (citing *Rugg*). Thus, in order to be liable for the intentional infliction of emotional distress, the defendant's conduct must be more than unreasonable, unkind or unfair; it must truly offend community notions of acceptable conduct. *Compare, e.g., Malandris* 703 F.2d at 1165 (affirmed jury award for outrageous conduct) *with Swanson v. Bixler*, 750 F.2d 810 (10th Cir. 1984) (affirmed dismissal of outrageous conduct claim).

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[4]We emphasize that we are not addressing the ADEA claim. The jury found that United had not violated the ADEA and Grandchamp and Seewald have not appealed from that verdict.

Both the court and the jury have a role in assessing such claims. "The jury determines the ultimate question whether conduct is outrageous, but the trial court decides whether the issue should be submitted to the jury in the first instance, based on whether reasonable persons could differ on the conduct being outrageous." *Montgomery Ward & Co. v. Andrews,* 736 P.2d 40, 46 (Colo. Ct. App. 1987) (citations omitted); *Churchey,* P.2d at

United argues first that the district court failed to make the required threshold determination of outrageousness. That is simply wrong. The district court addressed the issue twice. First, in denying United's motion for summary judgment on the emotional distress claim, the district court concluded: "If a jury were to conclude that the defendant's entire management reorganization was a mere scam to hide its efforts to dismiss older employees who had been with the company for years, a reasonable person could find 'outrageous' conduct." R. Vol. I, Tab 2 at 5. The court made a similar finding in response to United's motion for a directed verdict on the emotional distresss claim. R. Vol. III at 720–21.

United further argues that, if the district court did make the requisite threshold determination of outrageous conduct, that determination was in error. We agree. At the close of plaintiffs' case, there was no evidence upon which the jury could find United guilty of outrageous conduct toward Grandchamp and Seewald. The trial court should have directed a verdict for United on that claim.

The Colorado Supreme Court's recent decision in *Churchey,* reaffirms the central holding of *Rugg,* that outrageous conduct claims will lie only in circumstances that are truly outrageous. In *Churchey,* the plaintiff was discharged, according to her employer, "because of 'dishonesty,'" specifically because she 'failed and refused to report her medical clearances to return to work.'" *Id.* at . Chruchey brought suit against Coors claiming wrongful discharge, defamation and outrageous conduct.[5] The Colorado

[5]The trial court granted summary judgment on all three claims and the Colorado Court of Appeals affirmed. *Churchey v. Adolph Coors Co.,* 725 P.2d 38 (Colo. Ct. App. 1986), *rev'd in part,* P.2d (Colo. 1988). The Colorado Supreme Court affirmed the judgment on the outrageous conduct claim, but

Supreme Court affirmed a summary judgment for Coors on the outrageous conduct claim:

> Outrageous conduct can occur in an employement situation. However, Churchey's assertion that Coors' failure to follow its own personnel policies amounted to outrageous conduct confuses breach of contract with outrageous conduct. While the average member of the community may not approve of someone who breaches a contract, such conduct is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and ... (to cause) an average member of the community ... to exclaim 'Outrageous.'" The trial court correctly concluded that no reasonable person could have found Coors' conduct to be outrageous. We reject Churchey's invitation to expand our definition of outrageous conduct. The framework set forth in *Rugg*, 476 P.2d 753, is sufficient for analyzing her claim and summary judgment on this claim is affirmed.

*Churchey*, P.2d at (citations, footnote omitted).[6]

The court's reasoning in *Churchey* is also applicable to the claims advanced by Grandchamp and Seewald. Federal law provides a remedy for age discrimination. In this case, Grandchamp and Seewald allege nothing more than age discrimination; the manner in which they were discharged by United was not particularly unfair or abusive and is not comparable to those cases where outrageous conduct has been found.

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reversed the decision on the wrongful discharge and defamation claims and remanded them for trial. *Churchey*, P.2d at

[6]The Colorado Court also implicitly held that an employer is not to be held to a higher standard of conduct. Churchey argued that courts should be required "to look at the relationship between the parties and the entire conduct in determining whether a plaintiff has set forth a prima facie case of outrageous conduct." *Churchey*, P.2d at . The Court then recounted Churchey's allegations before rejecting "Churchey's invitation to expand our definition of outrageous conduct." *Id.* We read the Court's decision as a refusal to apply *Restatement § 46, comment e to employment situations.*

It is well-settled under Colorado law that discharge from employment, without more, is not outrageous conduct. *See Therrien v. United Air Lines, Inc.*, 670 F. Supp. 1517, 1524 (D. Colo. 1987) ("[A]n allegation by an employee that he was dismissed or demoted wrongfully, summarily, or in violation of the procedures set forth in an employee manual fails to state a claim for intentional infliction of emotional distress."); *Steinberg v. Thomas*, 659 F. Supp. 789, 795 (D. Colo. 1987) (discharge and alleged defamatory remarks do not support a claim of outrageous conduct); *Brezinski v. F.W. Woolworth Co.*, 626 F. Supp. 240, 244 (D. Colo. 1986) (alleged age discrimination does not support a claim of outrageous conduct); *Covert v. Allen Group, Inc.*, 597 F. Supp. 1268, 1269-70 (D. Colo. 1984) (no outrageous conduct in refusal to honor a promise to employ); *Salimi v. Farmers Ins. Group*, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (demotion in violation of employer's policy and procedure manual is not outrageous conduct); *Widdifield v. Robertshaw Controls Co.*, 671 P.2d 989, 990-91 (Colo. Ct. App. 1983) (reversed jury verdict for outrageous conduct where plaintiff's job was eliminated after 10 days).

At the same time, it is equally clear that an employer is not shielded from employee claims of outrageous conduct.[7] For example, in *Kirk v. Smith*, 674 F. Supp. 803 (D. Colo. 1987), the employee, a school teacher, was demoted from her position as a full-time teacher to a permanent substitute teacher, allegedly for expressing her support for the expansion of a particular program. Moreover, when she met with the school district superintendent to discuss her demotion, the superintendent "discovered that she was tape-recording the discussion, and, in an effort to confiscate the tape recorder, physically assaulted her and threw her to the ground." *Id.* at 804. Similarly, in *Wing v. JMB Property Management Corp.*, 714 P.2d 916, 918 (Colo. Ct. App. 1985) the plaintiff alleged that she was sexually harassed, ridiculed, threatened, humiliated and ultimately fired. The Colorado Court of Appeals found that these allegations were sufficient to withstand the employer's motion for summary judgment on the

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[7] *See generally* Annotation, *Liability of Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress*, 52 A.L.R. 4th 853 (1987).

outrageous conduct claim. Thus, the manner of the discharge, and the employer's conduct, is critical to a finding of outrageous conduct. *Cf. Montgomery Ward & Co. v. Andrews,* 736 P.2d 40, 46 (Colo. Ct. App. 1987) ("It is not the fact of seizure which give rise to the claim for outrageous conduct, but the manner in which the seizure was effected.") (quoting *Vogel v. Carolina International, Inc.,* 711 P.2d 708, 714 (Colo. Ct. App. 1985)).

In contrast, in this case Grandchamp and Seewald offered no evidence that that manner of their discharge was outrageous. As the court instructed the jury, "The Plaintiffs' ... claim is that the Defendant intentionally or recklessly, in an extreme or outrageous manner, inflicted severe emotional distress by reorganization of the management structure to purposefully eliminate older employees who had been with the company for many years." R. Vol. III at 733.

Thus, the most we can find from the evidence is that Grandchamp and Seewald were not given new positions because of their age and seniority. Certainly such an action by United would be wrong, and federal law makes such conduct unlawful and provides for relief. But if Grandchamp and Seewald were allowed to recover under a theory of outrageous conduct for United's actions here, then every discrimination claim — based on age, race, national origin, or sex — would also state a claim for outrageous conduct.[8] We do not believe that the Colorado Supreme

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[8]In essence, this court has already held that an ADEA claim for willful age discrimination does not require outrageous conduct. In *Cooper v. Asplundh Tree Expert Co.,* 836 F.2d 1544 (10th Cir. 1988), we rejected the Third Circuit's conclusion that a willful violation of the ADEA must be "outrageous." *See Dreyer v. Arco Chemical Co.,* 801 F.2d 651 (3d Cir. 1986), *cert. denied,* 107 S. Ct. 1348 (1987). Thus, in age discrimination cases, there is, theoretically, an hierarchy of damages. First, if an employer discriminates against an employee on the basis of age, he is liable for damages. If that discrimination is "willful," the employer must pay liquidated damages. *See Cooper,* 836 F.2d at 1548. If the manner of discrimination is outrageous, the employer is liable for the employee's emotional distress. Finally, under Colorado law, if the employee proves beyond a reasonable doubt that the outrageous conduct was attended by fraud, malice, or willful or wanton conduct, punitive damages may be assessed. *Churchey,* P.2d at

In *Churchey,* the Colorado Supreme Court also clarified the distinction between outrageous conduct and conduct meriting punitive damages:

Court intends the tort to reach that far. Thus, we hold that a bare age discrimination claim will not support a claim for the intentional infliction of emotional distress under Colorado law.

In *Price v. Federal Express Corp.*, 660 F. Supp. 1388, 1395 (D. Colo. 1987), the district court considered a similar problem. The plaintiff brough a civil rights and breach of contract claim against his employer. The plaintiff also alleged a claim for outrageous conduct. In considering the employer's motion for summary judgment, Judge Kane allowed the civil rights and breach of contract claims, but granted summary judgment for Federal Express on the outrageous conduct claim. His language is also suitable here:

> There is no virtue in pleading a profusion of claims for relief when the law provides a well-established and straightforward remedy. Indeed, the practice is inimical to the interests of the litigants for at least two reasons. First, it delays prosecution of the case and increases costs because of the time spent in addressing motions. Second, it creates an expanded possibility for reversible error in the event the pleader is persistent or the trial judge is diffident.

*Id.* at 1395. Unfortunately for Grandchamp and Seewald, Judge

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"[A]lthough the standard for outrageous conduct may appear superficially similar to the standard for exemplary damages in § 13-21-102(1), 6A C.R.S. (1987), the two are not the same. Exemplary damages may be awarded if 'the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct,' § 13-21-102(1)(a), provided that the plaintiff proves these elements beyond a reasonable doubt, § 13-25-127(2), 6A C.R.S. (1987). Outrageous conduct need only be proved by a preponderance of the evidence, § 13-25-127(1) and is an independent tort which entitles the plaintiff to compensatory damages. To the extent that Supp. 1388, 1395-96 (D. Colo. 1987), is inconsistent with this analysis, it is not an accurate statement of Colorado law."

*Churchey*, P.2d at n.7.

Kane's prediction has come true. The plaintiffs offered evidence at trial to support their age discrimination claim, but the jury chose to base its award on the outrageous conduct claim, finding for United on the ADEA claim.

Because the evidence offered at trial cannot support a claim for outrageous conduct against United, we REVERSE and VACATE the judgment entered by the trial court.

## OCTOBER 24, 1988

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Circuit Judges, and Honorable Edward Dumbauld, District Judge*

No. 86-2338

HAROLD W. GRANDCHAMP and
PETER J. SEEWALD,

*Plaintiffs-Appellees,*

v.

UNITED AIR LINES, INC.,

*Defendant-Appellant.*

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge David M. Ebel is recused.

ROBERT L. HOECKER, Clerk

* of the United States District Court for the Western District of Pennsylvania, sitting by designation.